

No. 16110

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United States  
Court of Appeals  
for the Ninth Circuit

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JERRY LEE BIRDSONG and DENNIS BIRDSONG, by and through their guardian ad litem, Ora Mae Birdsong, and ORA MAE BIRDSONG,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division

FILED

OCT -1 1958

PAUL P. O'BRIEN, CLERK



No. 16110

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United States  
Court of Appeals  
for the Ninth Circuit

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JERRY LEE BIRDSOING and DENNIS BIRD-  
SONG, by and through their guardian ad litem,  
Ora Mae Birdsong, and ORA MAE BIRD-  
SONG, Appellants,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,

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San Francisco, California,  
For Appellee.



In the United States District Court for the Northern District of California, Southern Division

No. 35390—Civil

JERRY LEE BIRDSONG and DENNIS BIRDSONG, by and through their guardian ad litem,  
ORA MAE BIRDSONG, and ORA MAE BIRDSONG, Plaintiffs,  
vs.

UNITED STATES OF AMERICA,  
Defendant.

### DOCKET ENTRIES

1956

Apr. 10—Filed complaint—issued summons.

Apr. 10—Filed petn. and order appointing Ora Mae Birdsong, gdn. ad litem of Jerry Lee Birdsong and Dennis Birdsong.

\* \* \* \* \*

June 12—Filed notice and motion by deft. for more definite statement, June 25, 1956.

June 12—Filed memo. of deft. in support of motion for more definite statement.

June 25—Ordered, motion for more definite statement continued to July 2, 1956.

July 2—Ordered after hearing motion for more definite statement submitted. (Murphy)

July 23—Filed order granting motion of defendant for more definite stnt. (Murphy)

July 24—Mailed copies order to counsel.

Oct. 9—Filed amended complaint.

1956

Nov. 19—Filed notice of motion by deft. for more definite statement, Dec. 3, 1956.

Nov. 19—Filed defendants memo. of points and authorities in support of motion for more definite statement.

Dec. 3—Ordered after hearing, motion for more definite statement granted. (Hamlin)

Dec. 4—Filed order granting motion of deft. for more definite statement. (Hamlin)

1957

Apr. 18—Filed second amended complaint.

May 7—Filed answer to second amended complaint.

May 17—Filed interrogatories by defendant to plaintiff Ora Mae Birdsong.

1958

Apr. 16—Mailed notice of dismissal calendar April 23, 1958.

Apr. 23—Ordered dismissed for lack of prosecution, April 23, 1958. (Goodman)

June 2—Filed notice and motion by plaintiff to set aside dismissal, June 9, 1958.

June 2—Filed affidavit of Jeremiah F. O'Neill, Jr. in support of motion to set aside dismissal.

June 6—Ordered motion to set aside dismissal assigned to Judge Goodman for hearing June 11, 1958. (Harris)

June 11—Ordered after hearing, motion to vacate dismissal, denied. (Goodman)

June 13—Filed notice of Appeal by plaintiff.

June 13—Filed appeal bond in sum \$250.00.

1958

June 13—Filed appellant's designation of record on appeal.

June 13—Mailed notices.

June 13—Filed answer of plaintiff to interrogs. by defendant.

June 13—Filed appellee's counter designation of record on appeal.

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[Title of District Court and Cause.]

## COMPLAINT FOR WRONGFUL DEATH

Plaintiffs complain of defendant that:

### I.

Prior to the filing of the complaint herein plaintiff Ora Mae Birdsong was duly appointed the guardian ad litem of the plaintiffs Jerry Lee Birdsong and Dennis Birdsong;

### II.

At all times mentioned herein relevant plaintiffs were and are residents of the County of Alameda, State of California, within the jurisdiction of the above entitled court; this action is brought pursuant to the "Federal Tort Claims Act";

### III.

At all times mentioned herein relevant defendant United States of America operated and controlled that certain Veterans Hospital located in the City of Oakland, County of Alameda, State of California;

## IV.

Plaintiffs Ora Mae Birdsong, Jerry Lee Birdsong and Dennis Birdsong are the sole heirs at law of Thomas William Birdsong, deceased;

## V.

On or about the 8th day of March, 1954, Thomas William Birdsong, deceased, was admitted to said Veterans Hospital for the treatment of ulcers and hypertension;

## VI.

At said time and place the defendant, United States of America, had employed in said hospital certain physicians, surgeons, nurses and hospital aids; said physicians, surgeons, nurses and hospital aids were at all times herein mentioned acting within the course and scope of their employment;

## VII.

On or about the aforesaid date, Thomas William Birdsong, deceased, was accepted as a patient by said physicians, surgeons, nurses and hospital aids, and they and each of them undertook in their respective capacities to attend and cure the decedent;

## VIII.

At said time and place, and thereafter until his death on April 11, 1954, said physicians, surgeons, nurses and hospital aids, who were then and there agents and employees of said defendant, United States of America, and who were acting within the course and scope of their employment, did not use

due and proper care or skill in examining and endeavoring to cure and treat the decedent of the aforesaid ailments; and further, that pursuant to said undertaking said defendant, United States of America, by and through its agents, treated said Thomas William Birdsong in a negligent and unskillful manner, including that certain operation performed on said decedent on March 10, 1954;

### IX.

As a proximate result of defendant's negligent and unskillful examination and treatment of decedent as aforesaid, said Thomas William Birdsong languished and died on the 11th day of April, 1954;

### X.

Decedent was an able bodied man, capable of, and he did financially support his wife and children, the plaintiffs herein;

### XI.

By reason of the premises, plaintiffs were compelled to and they did secure the services of duly licensed morticians and funeral homes, to their damage in a presently undetermined amount, which plaintiffs pray leave to insert by amendment when the same is determined;

### XII.

By reason of the premises plaintiffs were deprived of the care, comfort, support, society, love and affection of Thomas William Birdsong, deceased;



## XIII.

By reason of the premises, plaintiffs have been generally damaged in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiffs pray judgment against defendant as follows:

1. General damages in the sum of \$150,000.00;
2. Special damages as may be alleged;
3. Costs of suit; and
4. Any further meet relief.

KAISER & O'NEILL,  
/s/ By JEREMIAH F. O'NEILL, JR.,  
Attorneys for Plaintiffs

[Endorsed]: Filed April 10, 1956.

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[Title of District Court and Cause.]

PETITION AND ORDER FOR APPOINT-  
MENT OF GUARDIAN AD LITEM

To the Honorable the Superior Court of the State  
of California, in and for the County of Alameda:

The petition of Ora Mae Birdsong respectfully  
shows:

I.

That petitioner is a resident of the City of Oakland, County of Alameda, State of California, and is the mother of Jerry Lee Birdsong and Dennis Birdsong, who are minors of the ages of ten (10)



years and nine (9) years respectively; that said minors reside at 1228 - 103rd Avenue, Oakland, California, and said minors have no general or testamentary guardian.

## II.

That said minors have a cause of action against defendant above named, upon which their best interests require that they bring an action in this Court for damages.

## III.

That your petitioner is a competent and responsible person, qualified to act as the Guardian ad Litem of said minors in said action; that no previous application for an appointment of Guardian ad Litem in this action has been made.

Wherefore, petitioner prays that she be appointed Guardian ad Litem for said minors to prosecute their action in their behalf.

/s/ ORA MAE BIRDSONG,  
Petitioner Ora Mae Birdsong

State of California,  
County of Alameda—ss.

Ora Mae Birdsong, being first duly sworn, deposes and says: That she is the petitioner in the above entitled matter; that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge, except as to matters therein stated upon information or

belief, and as to such matters that she believes it to be true.

/s/ ORA MAE BIRDSONG

Subscribed and sworn to before me this . . . . day of April, 1956.

[Seal] /s/ ROBERT A. KAISER,  
Notary Public in and for the County of Alameda,  
State of California.

### ORDER

Ora Mae Birdsong is hereby appointed Guardian ad Litem of Jerry Lee Birdsong and Dennis Birdsong, plaintiffs herein.

Dated: April 10, 1956.

/s/ O. D. HAMLIN,  
Judge of the Superior Court

[Endorsed]: Filed April 10, 1956.

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[Title of District Court and Cause.]

### MOTION FOR A MORE DEFINITE STATEMENT

To: The plaintiffs above named, and to their attorneys, Kaiser & O'Neill, Easton Building, Oakland 12, California.

You and each of you Will Please Take Notice that on Monday, June 25, 1956, at the hour of 9:30 a.m. or as soon thereafter as counsel may be heard, the defendant United States of America will, in

the courtroom of the Master Calendar Judge of the above court, Post Office Building, Seventh and Mission Streets, San Francisco, California, move for a more definite statement of the allegations in plaintiffs' complaint, pursuant to the provisions of Rule 12(e) of the Federal Rules of Civil Procedure.

Said motion will be based upon all the records and papers on file herein, and the defendant's memorandum of points and authorities filed herewith.

Dated: June 11, 1956.

LLOYD H. BURKE,  
United States Attorney  
/s/ FREDERICK J. WOELFLEN,  
Assistant United States Attorney

Notice of Mailing attached.

[Endorsed]: Filed June 12, 1956.

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[Title of District Court and Cause.]

### ORDER

This is a motion for a more definite statement under Rule 12 of the Federal Rules of Civil Procedure.

The complaint charges that "said physicians, surgeons, nurses and hospital aids, who were then and there agents and employees of said defendant, United States of America, and who were acting within the course and scope of their employment, did not use due and proper care or skill in examin-

ing and endeavoring to cure and treat the decedent of the aforesaid ailments; and further, that pursuant to said undertaking said defendant, United States of America, by and through its agents, treated said Thomas William Birdsong in a negligent and unskillful manner, including that certain operation performed on said decedent on March 10, 1954''.

The defendant is entitled to more information than the allegation contained in the above quoted paragraph in order to prepare his defense.

The motion for a more definite statement is granted.

Dated: July 23rd, 1956.

/s/ EDWARD P. MURPHY,  
United States District Judge

[Endorsed]: Filed July 23, 1956.

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[Title of District Court and Cause.]

## AMENDED COMPLAINT FOR WRONGFUL DEATH

Plaintiffs complain of defendant that:

### I.

Prior to the filing of the complaint herein, plaintiff Ora Mae Birdsong was duly appointed the guardian ad litem of the plaintiffs Jerry Lee Birdsong and Dennis Birdsong;

### II.

At all times mentioned herein relevant plaintiffs

were and are residents of the County of Alameda, State of California, within the jurisdiction of the above entitled court; this action is brought pursuant to the "Federal Tort Claims Act";

### III.

At all times mentioned herein relevant defendant United States of America operated and controlled that certain Veterans Hospital located in the City of Oakland, County of Alameda, State of California;

### IV.

Plaintiffs Ora Mae Birdsong, Jerry Lee Birdsong and Dennis Birdsong are the sole heirs at law of Thomas William Birdsong, deceased;

### V.

On or about the 8th day of March, 1954, Thomas William Birdsong, deceased, was admitted to said Veterans Hospital for the treatment of ulcers and hypertension;

### VI.

At said time and place the defendant, United States of America, had employed in said hospital certain physicians, surgeons, nurses and hospital aides; said physicians, surgeons, nurses and hospital aides were at all times herein mentioned acting within the course and scope of their employment;

### VII.

On or about the aforesaid date, Thomas William Birdsong, deceased, was accepted as a patient by said physicians, surgeons, nurses and hospital aides,

and they and each of them undertook in their respective capacities to attend and cure the decedent;

### VIII.

At said time and place, and thereafter until his death on April 11, 1954, said physicians and surgeons, nurses and hospital aides, who were then and there agents and employees of said defendant, United States of America, and who were acting within the course and scope of their employment, did not use proper care or skill in examining and endeavoring to cure and treat the decedent, in that no proper diagnosis was made prior to surgery to determine whether decedent was suffering from any condition that would contra-indicate surgery or anesthesia; and further, that pursuant to said undertaking, said defendant, United States of America, by and through its agents, treated said Thomas William Birdsong in a negligent and unskillful manner concerning that said operation performed on said decedent on March 10, 1954, in that said operation was performed under unsterile conditions and without proper pre-operative diagnosis as to the decedent's condition;

### IX.

As a proximate result of defendant's negligent and unskillful examination and treatment of decedent as aforesaid, said Thomas William Birdsong languished and died on the 11th day of April, 1954;

### X.

Decedent was an able bodied man, capable of,



and he did financially support his wife and children, the plaintiffs herein;

XI.

By reason of the premises, plaintiffs were compelled to and they did secure the services of duly licensed morticians and funeral homes, to their damage in a presently undetermined amount, which plaintiffs pray leave to insert by amendment when the same is determined;

XII.

By reason of the premises plaintiffs were deprived of the care, comfort, support, society, love and affection of Thomas William Birdsong, deceased;

XIII.

By reason of the premises, plaintiffs have been generally damaged in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiffs pray judgment against defendant as follows:

1. General damages in the sum of \$150,000.00;
2. Special damages as may be alleged;
3. Costs of suit; and
4. Any further meet relief.

KAISER & O'NEILL,  
/s/ By JEREMIAH F. O'NEILL, JR.,  
Attorneys for Plaintiffs

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 9, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR  
MORE DEFINITE STATEMENT

To: Plaintiffs above named and their attorneys,  
Kaiser & O'Neill, Easton Building, Oakland 12,  
California.

You and each of you Will Please Take Notice that on Monday, December 3, 1956, at the hour of 9:30 a.m. or as soon thereafter as counsel may be heard, the defendant United States of America will, in the court room of the master calendar judge of the above-named court, Post Office Building, Seventh and Mission Streets, San Francisco, California, move for a more definite statement of the allegations contained in Paragraph VIII of plaintiffs' First Amended Complaint.

Said motion will be made pursuant to the provisions of Rule 12(b) of the Federal Rules of Civil Procedure, and will be based upon all the papers and records on file herein, and the defendant's memorandum of points and authorities filed herewith.

Dated: November 19, 1956.

LLOYD H. BURKE,

United States Attorney

/s/ By FREDERICK J. WOELFLEN,

Assistant United States Attorney

Notice of mailing attached.

[Endorsed]: Filed November 19, 1956.



[Title of District Court and Cause.]

ORDER FOR A MORE DEFINITE  
STATEMENT

The motion of the defendant United States of America for a more definite statement with respect to the allegations set forth in paragraph VIII of plaintiff's amended complaint came on regularly for hearing on December 3, 1956. The Court having been advised of the law and the premises, It Is Hereby Ordered that defendant's motion for a more definite statement be and the same is hereby granted.

Dated: December 4, 1956.

/s/ O. D. HAMLIN,  
United States District Judge.

Notice of service by mail attached.

[Endorsed]: Filed December 4, 1956.

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[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT FOR  
WRONGFUL DEATH

Plaintiffs complain of defendant that:

I.

Prior to the filing of the complaint herein, plaintiff Ora Mae Birdsong was duly appointed the guardian ad litem of the plaintiffs Jerry Lee Birdsong and Dennis Birdsong;

## II.

At all times mentioned herein relevant plaintiffs were and are residents of the County of Alameda, State of California, within the jurisdiction of the above entitled court; this action is brought pursuant to the "Federal Tort Claims Act";

## III.

At all times mentioned herein relevant defendant United States of America operated and controlled that certain Veterans Hospital located in the City of Oakland, County of Alameda, State of California;

## IV.

Plaintiffs Ora Mae Birdsong, Jerry Lee Birdsong and Dennis Birdsong are the sole heirs at law of Thomas William Birdsong, deceased;

## V.

On or about the 8th day of March, 1954, Thomas William Birdsong, deceased, was admitted to said Veterans Hospital for the treatment of ulcers and hypertension;

## VI.

At said time and place the defendant, United States of America, had employed in said hospital certain physicians, surgeons, nurses and hospital aides; said physicians, surgeons, nurses and hospital aides were at all times herein mentioned acting within the course and scope of their employment;

## VII.

On or about the aforesaid date, Thomas William

Birdsong, deceased, was accepted as a patient by said physicians, surgeons, nurses and hospital aides, and they and each of them undertook in their respective capacities to attend and cure the decedent;

### VIII.

At said time and place, and thereafter until his death on April 11, 1954, said physicians and surgeons, nurses and hospital aides, who were then and there agents and employees of said defendant, United States of America, and who were acting within the course and scope of their employment, did not use proper care or skill in examining and endeavoring to cure and treat the decedent, in that no proper diagnosis was made prior to surgery to determine whether decedent was suffering from any condition that would contra-indicate surgery or anesthesia; and further, that pursuant to said undertaking, said defendant, United States of America, by and through its agents, treated said Thomas William Birdsong in a negligent and unskillful manner concerning that said operation performed on said decedent on March 10, 1954, in that said operation was performed under unsterile conditions, in this, that the instruments used in said operation were unsterile, that the operating room and equipment therein were unsterile, and that no precautions were taken to prevent infection and disease from entering the operative wound;

### IX.

As a proximate result of defendant's negligent

and unskillful examination and treatment of decedent as aforesaid, said Thomas William Birdsong languished and died on the 11th day of April, 1954;

X.

Decedent was an able bodied man, capable of, and he did financially support his wife and children, the plaintiffs herein;

XI.

By reason of the premises, plaintiffs were compelled to and they did secure the services of duly licensed morticians and funeral homes, to their damage in a presently undetermined amount, which plaintiffs pray leave to insert by amendment when the same is determined.

XII.

By reason of the premises plaintiffs were deprived of the care, comfort, support, society, love and affection of Thomas William Birdsong, deceased;

XIII.

By reason of the premises, plaintiffs have been generally damaged in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiffs pray judgment against defendant as follows:

1. General damages in the sum of \$150,000.00;
2. Special damages as may be alleged;
3. Costs of suit; and

4. Any further meet relief.

KAISER & O'NEILL,

/s/ By JEREMIAH F. O'NEILL, JR.,  
Attorneys for Plaintiffs

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 18, 1957.

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[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED  
COMPLAINT

Comes now defendant United States of America and answers the Second Amended Complaint of plaintiffs as follows:

Answering paragraphs V, VI, VII, VIII, IX, X, XI and XII, this answering defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof, and further denies that plaintiffs were damaged in the sum of \$150,000, or in any other sum or amount whatsoever.

Wherefore, defendant prays that plaintiffs take nothing by their said complaint, and that said complaint be dismissed with defendant's cost of suit herein incurred and such other and further relief as to the Court may be meet and proper in the premises.

Dated: May 6, 1957.

LLOYD H. BURKE,  
United States Attorney  
/s/ FREDERICK J. WOELFLEN,  
Assistant United States Attorney  
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 7, 1957.

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[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY  
UNITED STATES OF AMERICA, TO BE  
ANSWERED UNDER OATH, IN TRIPLI-  
CATE, WITHIN 15 DAYS OF RECEIPT  
BY PLAINTIFF ORA MAE BIRDSONG

If any of the following interrogatories cannot be answered in full, please answer to the extent possible, specifying the reason for your inability to answer the remainder, and stating whatever information or knowledge you have concerning the unanswered portion. It is requested that the United States Attorney be supplied with three copies of your answers.

1. Please identify yourself by giving full name, age, residence and occupation.
2. Please state the full name, age, occupation and last residence of the deceased.
3. Please give all addresses at which deceased



resided for the five years immediately preceding death.

4. Please state your relationship, if any, to decedent.

5. Please give names, ages and addresses of all of the heirs, and next-of-kin of decedent, and the relationship of each individual to the decedent.

6. Did the decedent leave a will?

7. If your answer to the preceding interrogatory is in the affirmative, please state when, where and in what court said will was presented for probate.

8. If the decedent had any accidents, illnesses or disease within ten years prior to the date of the accident alleged in your declaration, please state fully:

(a) The nature of such accidents, illnesses or diseases;

(b) When and where they were sustained or suffered;

9. Please give the names and addresses of any person or persons to whom deceased resorted, or consulted by deceased, to obtain medical care, advice or attention within the ten years immediately preceding death.

10. Please give the name and address of each hospital, sanatorium, clinic, health farm or rest home, in which the decedent received medical care, advice or treatment within the ten years immediately preceding death.

11. Please state the name and address of the employer of the decedent prior to the happening of the accident.

12. If the decedent was self-employed, please state the name and address of the firm or business under which the business or profession was operated.

13. If the decedent was self-employed, please indicate whether such employment was as an individual or in partnership, or other association, with others.

14. If your answer to the preceding interrogatory is to the effect that the decedent was engaged in a partnership, or other association, with others, please give:

(a) The names and addresses of all partners or associates of the decedent;

(b) The type of business or occupation engaged in by said partnership or other association, its firm name and style, and the address of its principal place of business.

15. If the decedent, immediately prior to or at the time of death, was employed by a corporation, or for a salary, or for wages, please state:

(a) The average amount of the decedent's weekly or monthly salary or wages, on the basis of the last five (5) years' employment;

(b) The name and address of the employer of the decedent;

(c) The names and addresses of all employers of the decedent in the five (5) years prior to death;

(d) The exact weekly, monthly, or annual wage received by decedent at the time of death;

(e) The exact weekly, monthly, or annual wage



received from each employer of the decedent in the five (5) years prior to death.

16. If the deceased was self-employed, please state:

(a) The average income from the business or profession of the decedent, on the basis of the five (5) years prior to death;

(b) The income from the business or profession of the decedent:

(1) In the calendar year 1951;

(2) In the calendar year 1952;

(3) In the calendar year 1953.

17. If the deceased was engaged in a partnership, or other association, with others, please state:

(a) The average income from the partnership, or other association, on the basis of the five (5) years prior to death.

(b) The income from the partnership or other association:

(1) In the calendar year 1951;

(2) In the calendar year 1952;

(3) In the calendar year 1953.

18. Did the decedent obtain or receive income from any source other than from business, profession, occupation, wages or salary in the five (5) years prior to death?

19. If your answer to the preceding interrogatory is in the affirmative, please itemize such income:

(a) Received in the calendar year 1950;

(b) Received in the calendar year 1951;

(c) Received in the calendar year 1952;

(d) Received in the calendar year 1953.

20. Did the deceased leave next-of-kin who were dependent upon him for support:

(a) Wholly?

(b) In part?

21. If your answer to the preceding interrogatory is in the affirmative, please give the names, ages and addresses of all such persons and the relationship of each to the deceased.

22. If your answers to interrogatory number 20 is in the affirmative, please itemize the amount paid or contributed to the aid or support of any dependent:

(a) In the calendar year 1951;

(b) In the calendar year 1952;

(c) In the calendar year 1953.

23. Please state the value of the decedent's estate at the date of death.

24. Prior to the admission of Thomas Birdsong to the Veterans Administration Hospital on March 8, 1954, had he been hospitalized within the preceding five years for any difficulty or complaints pertaining to his stomach, heart, kidneys, bladder, or for a nervous disorder? If so, state:

(a) The hospitals to which he was admitted, with dates of admission and discharge;

(b) The names and addresses of attending physicians;

(c) The specific medical complaints for which he was treated.

25. Within the five years immediately preceding March 8, 1954, had Thomas Birdsong been under the care of any physician or surgeon with respect to stomach, heart, kidneys, bladder, or for nervous disorders or complaints which did not require his being hospitalized? If so, state:

(a) The names and addresses of the physicians who attended him;

(b) The specific medical complaints for which he was treated.

26. At any time within the five years immediately preceding March 8, 1954, had Thomas Birdsong been confined to a hospital as a result of any cardiac or cardiovascular difficulty? If so, state:

(a) The hospitals to which he was so confined, with dates of admission and discharge;

(b) The names and addresses of attending physicians;

(c) The specific medical complaints for which he was hospitalized.

27. At any time within the five years immediately preceding March 8, 1954, had Thomas Birdsong been under the care of a physician for cardiac or cardiovascular complaints which did not require confinement in a hospital? If so, state:

(a) The names and addresses of the doctors who so attended him;

(b) The approximate periods of time he was under the care of such doctors;

(c) The specific medical complaint for which he was treated.

28. At any time between March 8, 1954 and April 11, 1954, while Thomas Birdsong was confined to the Veterans Administration Hospital in Oakland, California, was he examined by any private physician who was not an employee of the Veterans Administration or who was not a consultant for said hospital? If so, state:

(a) The name of the doctor who so examined him;

(b) Said doctor's relationship to Thomas Birdsong and to you;

(c) When such examination took place;

(d) Whether you or your attorney has in your possession or control any medical report by said doctor covering said examination. If so, will you kindly attach a copy of the report to your answers, thus obviating the necessity for defendant's moving the Court for production of same.

29. At any time while Thomas Birdsong was confined in the Veterans Administration Hospital in Oakland between March 8, 1954 and April 11, 1954, was any private physician (not an employee of the Veterans Administration and not acting as consultant thereto) called into consultation with any of the physicians who were then attending Thomas Birdsong for any of the conditions for which he was confined to said hospital? If so, kindly state such doctor's name, his address, and his relationship to either you or Thomas Birdsong, if any.

30. If such consultation occurred, kindly state:

(a) The medical condition of Thomas Birdsong for which he was called into consultation;

(b) Whether the physician who was called into consultation prepared a report setting forth his diagnosis and prognosis of Thomas Birdsong's condition;

(c) Whether, if either you or your attorney has within your custody or control such consultation report, you will voluntarily attach a copy of it to the answers hereto (thus eliminating the necessity for defendant's moving the Court for its production).

31. Were you at any time orally advised by any doctor who examined Thomas Birdsong while he was confined at the Oakland Veterans Administration Hospital from March 8, 1954, to April 11, 1954, concerning his condition and the prognosis for his recovery? If so, please state:

(a) When you were so advised;

(b) The name and address of the doctor who discussed this matter with you;

(c) Such doctor's relationship to you or Thomas Birdsong;

(d) Where such discussion took place;

(e) What, in substance, you were orally advised by said doctor.

32. Were you ever orally advised by any physician who attended, treated and cared for Thomas Birdsong in the Oakland Veterans Administration Hospital between March 8, 1954, and April 11, 1954, as to the result of said physician's examination, treatment and operative procedure, and as to his diagnosis and prognosis regarding your husband's



condition and his chances for recovery? If so, please state:

- (a) When you were so advised;
- (b) The name and address of the physician who so advised you;
- (c) His relationship, if any, to either you or Thomas Birdsong;
- (d) The substance of what you were so advised.

33. Are you or any of the decedent's heirs or next-of-kin receiving any death benefits from any agency of the U. S. Government, State of California, or municipality arising out of the death of Thomas Birdsong which occurred on April 11, 1954? If so, state:

- (a) From whom you are receiving the benefits;
- (b) The amount each person is receiving either per week, per month, or per year by way of benefits;
- (c) When the payments in question commenced.

34. Following the death of Thomas Birdsong on April 11, 1954, did you discuss with any doctor, nurse, medical aid or attendant, or employee of the Veterans Administration Hospital, Oakland, California, or with the Veterans Administration Regional Office, San Francisco, California, the nature, extent and results of any and all medical treatment, diagnostic tests, clinical studies, pathology procedures and reports, operative and surgical procedures, consultations, diagnosis and prognosis given, made, administered or undertaken, concerning Thomas Birdsong's physical condition and

illness which occurred during his confinement in the Veterans Administration Hospital, Oakland, California, from March 8, 1954 to April 11, 1954? If so, state:

(a) The names and addresses, and relationship to you of the person or persons with whom you had such discussions.

(b) When and where these discussions took place.

(c) What you were told.

35. At any time following the death of Thomas Birdsong on April 11, 1954, did any doctor of your own choosing, or as a volunteer in your behalf, review and inspect the medical records and files of the Veterans Administration Hospital, Oakland, California, covering your late husband's confinement in that institution from March 8, 1954, to April 11, 1954?

36. If your answer to the foregoing interrogatory is in the affirmative, kindly state:

(a) The name and address of the doctor who inspected or reviewed these medical records and files.

(b) When and where the doctor reviewed and inspected these records and files.

(c) If you received a verbal or written report from said doctor concerning his medical findings and opinions regarding the medical treatment your husband received and your husband's physical condition, and his chances for recovery, based upon said doctor's examination and recommendations in the Veterans Administration Hospital's records and files.

(d) If said report was written, kindly attach a copy thereof to your answer to these interrogatories.

37. Subsequent to your husband's death in the Oakland Veterans Administration Hospital on April 11, 1954, have you discussed or received any information from any doctor, private consultant, medical aid or attendant, or employee of the Veterans Administration concerning the existence of unsanitary conditions, the use of unsanitary instruments and equipment, and the lack of proper precautions being used to prevent infection and disease during your husband's operation of March 10, 1954 at the Veterans Administration Hospital, Oakland, California? If so, state:

(a) The names and addresses and relationship to you of all persons with whom you discussed this matter or who supplied you with information regarding the conditions mentioned above.

(b) If you or your attorneys have any written reports regarding the subject of this interrogatory, list the names and addresses of the person or persons who supplied or furnished such a report.

38. If your answer to the foregoing interrogatory is in the negative, kindly state the source of information which is the basis of your allegation in Paragraph VIII of Second Amended Complaint which reads as follows:

"That pursuant to said undertaking, said defendant United States of America, by and through its agents, treated said Thomas William Birdsong in a negligent and unskillful manner concerning that



said operation performed on said decedent on March 10, 1954 in that said operation was performed under unsterile conditions, in this, that the instruments used in said operation were unsterile, that the operating room and equipment therein were unsterile, and that no precautions were taken to prevent infection and disease from entering the operative wound.”

39. Subsequent to your husband's death in the Veterans Administration Hospital, Oakland, on April 11, 1954, have you discussed with, or received any information from, any doctor, private consultant, nurse, medical aid or attendant, or employee of the Veterans Administration indicating that the physicians, surgeons, nurses and hospital aids at the Veterans Administration Hospital, Oakland, California, did not use proper care or skill in examining and endeavoring to cure and treat your husband—particularly, that they did not make a proper diagnosis prior to surgery performed upon him to determine whether your husband was suffering from any condition that would contra-indicate surgery or anaesthesia? If so, state:

(1) The names and addresses and relationship to you of all persons with whom you have discussed this matter, or who supplied you with information regarding the conditions mentioned above.

(2) If you have any written reports regarding the subject matter of this interrogatory, list the names and addresses of the person or persons who supplied you with such a report.

40. If your answer to the foregoing interrogatory

is in the negative, kindly state the source of the information which is the basis of your allegation as contained in Paragraph VIII of the Second Amended Complaint which states:

“At said time and place, and thereafter until his death on April 11, 1954, said physicians and surgeons, nurses and hospital aids, were then and there agents and employees of said defendant United States of America, and who were acting within the course and scope of their employment, did not use proper care or skill in examining and endeavoring to cure and treat the decedent, in that no proper diagnosis was made prior to surgery to determine whether decedent was suffering from any condition that would contra-indicate surgery or anaesthesia;”

41. With respect to the allegations contained in paragraph VIII of your Second Amended Complaint, state with particularity:

(a) The names and identities of all physicians and surgeons, nurses and hospital aids who were employees of the U. S. Government at the Veterans Administration Hospital, Oakland, California, from March 8, 1954 to April 11, 1954, who did not use proper skill in examining and endeavoring to cure and treat your husband, who did not make a proper diagnosis prior to your husband's surgery, to determine whether he was suffering from any condition that would contra-indicate surgery or administration of an anaesthesia, or who used unsterile, operative equipment, who allowed the operating room and its equipment to be used in an

unsterile condition, and who took no precautions to prevent infection and disease from entering your husband's operative wound.

(b) The exact nature of said negligence and carelessness, and name all the acts or omissions committed by each of said surgeons, physicians, nurses and hospital aids in each of the alleged negligent circumstances mentioned in paragraph VIII.

Dated: May 16, 1957.

LLOYD H. BURKE,

United States Attorney

/s/ By FREDERICK J. WOELFLEN,

Assistant United States Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 17, 1957.

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United States District Court for the Northern District of California, Southern Division

No. 35390—Civil

JERRY LEE BIRDSONG and DENNIS BIRDSONG, by and through their guardian ad litem, ORA MAE BIRDSONG, and ORA MAE BIRDSONG, Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

### ORDER OF DISMISSAL

At a Stated Term of the United States District Court for the Northern District of California,

Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 23rd day of April, in the year of our Lord one thousand nine hundred and fifty-eight.

Present: the Honorable Louis E. Goodman.

This case came on regularly this day for dismissal for lack of prosecution.

Ordered said case dismissed for lack of prosecution.

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[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO SET  
ASIDE DISMISSAL FOR LACK OF  
PROSECUTION

To the Defendant, United States of America, and  
to Lloyd H. Burke and Frederick J. Woelflen,  
attorneys for defendant:

You and Each of You Please Take Notice that on Monday, the 9th day of June, 1958, at 9:30 o'clock a.m., in the Law and Motion Department, Court House, Seventh and Mission, San Francisco, California, plaintiffs will move the above entitled court for an order setting aside and vacating the order of dismissal heretofore entered on April 23, 1958, on the grounds that said order was made through the inadvertence and excusable neglect on the part of plaintiffs' attorneys, and further on the grounds that the interests of justice would be served thereby.

Said motion will be based on this Notice of

Motion, upon the affidavit of Jeremiah F. O'Neill, Jr. attached hereto and made a part hereof, and upon all the records and papers on file herein.

Dated: May 28, 1958.

KAISER & O'NEILL,  
/s/ By JEREMIAH F. O'NEILL, JR.,  
Attorneys for Plaintiffs

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 2, 1958.

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[Title of District Court and Cause.]

AFFIDAVIT OF JEREMIAH F. O'NEILL, JR.

State of California,  
County of Alameda—ss.

Jeremiah F. O'Neill, Jr., being duly sworn, deposes and says: That he is an attorney licensed to practice before the above entitled court, and is one of the attorneys for the plaintiffs herein;

That plaintiffs employed your affiant's office to prosecute the within action shortly before April 10, 1956, and that your affiant caused the original Complaint herein to be filed on the 10th day of April, 1956;

That defendant's answer to the second amended complaint was filed in May of 1957, and that thereafter defendant served 41 written interrogatories upon plaintiffs; that plaintiff Ora Mae Birdsong is a widow with two small sons, and at the time the



interrogatories were served upon this office was employed six days a week, and subsequently found it very difficult to present herself in affiant's office for the purpose of answering interrogatories; that because of this difficulty, the interrogatories were answered on August 29, 1957;

That on December 17, 1957, your affiant wrote a letter to Mr. Frederick J. Woelflen, one of the attorneys for the defendant herein, requesting that depositions of the Custodian of Records of the Veterans Administration Hospital and the doctors involved be taken, a copy of which letter is attached hereto and incorporated herein by reference; that in said letter your affiant requested that he be advised whether the depositions could be taken by stipulation, or whether the United States Attorney's Office requests notice of depositions to be taken; that within a few days after sending the letter above referred to, your affiant received a telephone call from Mr. Woelflen to discuss the subject matter of the letter; that at said time Mr. Woelflen stated to your affiant that the defendant was willing to have the depositions taken by stipulation, but that the whereabouts of some of the doctors might not be known since the possibility existed that some of them were no longer with the Veterans Administration Hospital; Mr. Woelflen further stated that because of this problem, it would probably take considerable time for him to locate the doctors and arrange for the taking of their depositions, and that he would contact your affiant when the same were arranged;

That, relying upon the statements of Mr. Woelflen, your affiant inadvertently filed the case away, and due to the press of business, did not do anything further with reference to the taking of the depositions while waiting to hear further from Mr. Woelflen; that because of Mr. Woelflen's statement that considerable time would be necessary to contact the doctors, your affiant was not worried about the passage of time until the notification that the case would appear on the dismissal calendar; that at that time your affiant again telephoned Mr. Woelflen and was advised by him for the first time that the doctors were not available; that had your affiant known that the doctors were not available, he would have proceeded with the deposition of the Custodian of Records of the Veterans Administration Hospital, as well as taking investigative steps to locate the doctors;

That your affiant feels that the length of time during which no steps were taken in the within case were due to inadvertence and excusable neglect on his part. Your affiant feels that the plaintiffs have a valid cause of action and that the best interests of justice will be served by setting aside the order of dismissal and allowing the matter to be heard on its merits.

/s/ JEREMIAH F. O'NEILL, JR.

Subscribed and sworn to before me this 29th day of May, 1958.

[Seal] /s/ LUCILLE T. HALL,

Notary Public in and for County of Alameda, State of California.



Mr. Frederick J. Woelflen

Dec. 17, 1957

Assistant U. S. Attorney

422 Post Office Building, Seventh and Mission  
San Francisco 1, California

Re: Birdsong vs. U. S., Civil No. 35390.

Dear Mr. Woelflen:

I would like very much to take the depositions of the doctors involved in the above case, as well as the Custodian of Records of the VA Hospital in Oakland.

The doctors' names that I presently have are a Dr. Moore and a Dr. Schoenberger, and I think that perhaps the best way to proceed would be to take the deposition of the Custodian of Records first, so that we may thereby ascertain the names of any other doctors involved.

Would you kindly advise whether these matters can be disposed of by stipulation or whether it is necessary for your office to have noticed depositions set up.

Thank you for your cooperation. Best wishes.

Very truly yours,

KAISER &amp; O'NEILL,

By .....

JFO:lh

Jeremiah F. O'Neill, Jr.

[Endorsed]: Filed June 2, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Honorable Louis E. Goodman, Judge of  
the United States District Court for the North-  
ern District of California, Southern Division.

Plaintiffs Jerry Lee Birdsong and Dennis Bird-  
song, by and through their guardian ad litem, Ora  
Mae Birdsong, and Ora Mae Birdsong, hereby ap-  
peal from that order of the above entitled Court  
and the Honorable Louis E. Goodman, Judge  
thereof, made and entered in the above entitled  
matter on the 23rd day of April, 1958, dismissing  
the within action, and further appeal from that  
order denying plaintiffs' motion to set aside dis-  
missal for lack of prosecution made and entered  
on June 11, 1958.

This notice is filed for the purpose of complying  
with the requirements of the provisions of Rule  
73 (b), Rules on Appeal.

Dated: June 12, 1958.

KAISER & O'NEILL,  
/s/ By JEREMIAH F. O'NEILL, JR.,  
Attorneys for Plaintiffs

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

### UNDERTAKING FOR COSTS ON APPEAL

Whereas, the above entitled Plaintiffs, Jerry Lee Birdsong, and Dennis Birdsong, by and through their guardian ad litem Ora Mae Birdsong, and Ora Mae Birdsong, are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment entered against them in said action in said District Court of the United States, Northern District of California, Southern Division on April 23, 1958 and June 11, 1958.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Standard Accident Insurance Company, a corporation, organized and existing under and by virtue of the laws of the State of Michigan, and duly authorized and licensed to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellants, that said Appellants will pay all costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It Is Further Stipulated as a part of the foregoing bond, that in case of the breach of any condition thereof, the above named District Court may upon ten (10) days notice to the surety, Standard Accident Insurance Company, above named, pro-

ceed summarily in said action or suit, to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

Signed and Sealed at Oakland, California, this 12th day of June, 1958.

[Seal]            STANDARD ACCIDENT INSUR-  
                     ANCE COMPANY,

/s/ By J. P. SIMPSON,  
         Attorney in fact

Premium charged \$10 per annum

Affidavit of Verification attached.

[Endorsed]: Filed June 13, 1958.

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[Title of District Court and Cause.]

### ANSWER TO INTERROGATORIES

1. Ora Mae Birdsong, age 30. 1228 - 103rd Ave., Oakland, Calif. Cashier, Schaffner & Watson, San Leandro, Calif.

2. Thomas Birdsong, age 30. Transformer Assembly, Electro Engineering, San Leandro, Calif. 10429 Royal Ann, Oakland, Calif.

3. 10429 Royal Ann, Oakland, Calif. 1228 - 103rd Ave., Oakland, Calif.

4. Widow.

5. Jerry Lee Birdsong, son, age 11, 1228 - 103rd Ave., Oakland, Calif. Dennis Birdsong, son, age 10, 1228 - 103rd Ave., Oakland, Calif. Grace Birdsong,

mother, Decatur, Alabama. Newt Birdsong, father, Decatur, Alabama. Charles Birdsong, brother, Decatur, Alabama. Judy Smith, sister, Decatur, Alabama. Opal Terry, sister, Decatur, Alabama. Ann Wasiewicz, sister. Charlotte Robbins, sister, Decatur, Alabama.

6. No.

7. ....

8. No accidents. Illnesses—high blood pressure, ulcers—service connected. Other illnesses unknown.

9. Dr. Paul Rahn, 515 Estudillo, San Leandro, Calif. Veterans Hospital, Oakland, Calif. A psychiatrist, name forgotten, to whom deceased was referred by Veterans Administration.

10. Veterans Hospital, Oakland, Calif.

11. Electro Engineering, 401 Preda, San Leandro, Calif.

12. Not self employed.

13. Not self employed.

14. Not self employed.

15. (a) Approximately \$4000.00 yearly. (b) Electro Engineering, 401 Preda, San Leandro, Calif. (c) General Electric Co., 5441 E. 14th St., Oakland, Calif., Electro Engineering, 401 Preda, San Leandro, Calif. (d) Unknown. (e) Unknown.

16. Not self employed.

17. Not self employed.

18. No.

19. ....

20. None other than widow and two sons, who are plaintiffs.

21. ....

22. ....

23. No estate.

24. (a) Veterans Hospital, Oakland, Sept. 1948, August, 1949, and periodically until March 8, 1954.

(b) Unknown—various physicians at Veterans Hospital, Oakland. (c) Hypertension and ulcers.

25. (a) Dr. Paul Rahn, 515 Estudillo, San Leandro, Calif. (b) Hypertension and ulcers.

26. All hospitalizations have been at the Veterans Hospital, Oakland, Calif., as stated in Answer 24.

27. The only other physician involved was Dr. Paul Rahn, 515 Estudillo, San Leandro, Calif., as stated in Answer 25.

28. No.

29. Not to my knowledge.

30. ....

31. (a) During hospitalization, March 8-April 11, 1954. (b) Unknown. (c) Doctors at Veterans Hospital, Oakland, Calif. (d) At Veterans Hospital, Oakland, Calif. (e) I was advised that my husband had ulcers, necessitating surgery; that his blood pressure was high and as soon as it leveled off he would be taken to surgery. Before surgery, I was told not to get my hopes up; after surgery I was advised that he was doing well. On April 11, 1954, I was told that my husband didn't have long, and I was advised to call his family.

32. See Answer 31.

33. (a) Veterans Administration. (b) \$150.00 a month for myself and two sons. (c) Approximately November, 1955.



34. (a) 1. Dr. Moore, Veterans Hospital, Oakland, Calif.; 2. Veterans Administration, San Francisco, Calif. (b) 1. At Veterans Hospital, Oakland, within two or three months after April 11, 1954; 2. On telephone within four months after April 11, 1954. (c) 1. That in his opinion my husband's illness had gone back for a long time and that I should have the American Legion representative at hospital contact him; 2. Advised first how to obtain autopsy report and after I advised them I was unable to obtain it through regular channels, that the report would be of no value to me any way, because I wouldn't understand it if I had it.

35. No.

36. ....

37. No.

38. At the time of my husband's confinement at the hospital, I personally observed filth and dirt everywhere; there was dirt and fuzz under the beds; filled urinals were allowed to remain under the beds all day, and the entire operation of the hospital was filthy and unsterile.

39. No.

40. I was advised by my attorney that if my husband had hepatitis before surgery, that my doctor should know that his liver could not tolerate anesthesia.

41. (a) The doctors who performed the surgery were Dr. Moore and Schoenberger of the Veterans Hospital, Oakland. The names of the other doctors, nurses, hospital aids and other employees are not known to me, but are probably contained in the



medical records at the hospital. (b) 1. If my husband had hepatitis prior to surgery, proper medical procedures would have diagnosed the condition; 2. If the doctors knew that my husband had hepatitis prior to surgery, proper medical procedure would have indicated that the liver could not tolerate anesthesia.

KAISER & O'NEILL,  
/s/ By JEREMIAH F. O'NEILL, JR.,  
Attorneys for Plaintiffs

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 13, 1958.

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[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS  
AND DESIGNATION OF RECORD

To: The Honorable United States District Court  
for the Northern District of California, Southern  
Division:

Plaintiffs Jerry Lee Birdsong and Dennis Birdsong, by and through their guardian ad litem, Ora Mae Birdsong, and Ora Mae Birdsong, in accordance with Rule 75 (a) of the Rules of Civil Procedure, hereby file Appellants' Statement of Points and Designation of Record in the above entitled cause as follows:

That the Honorable Court erred in dismissing the within action for lack of prosecution on April 23, 1958.

Appellants hereby designate the following portions of the record to be contained in the Record on Appeal:

The Complaint, the First Amended Complaint, the Second Amended Complaint, the Answer to the Second Amended Complaint, the Affidavit of Service by Mail of the Answers to Interrogatories, the Notice of Motion and Motion to Set Aside Dismissal for Lack of Prosecution, the Affidavit of Jeremiah F. O'Neill, Jr. in Support of said Motion, together with the copy of the letter attached to said Affidavit and incorporated therein by reference.

Appellants hereby designate the following portion of the reporter's record to be contained in the Record on Appeal:

All oral proceedings had on the proceedings for dismissal for lack of prosecution on April 23, 1958, and all oral proceedings had on the motion to set aside dismissal for lack of prosecution on June 11, 1958.

Dated: June 12, 1958.

KAISER & O'NEILL,  
/s/ By JEREMIAH F. O'NEILL, JR.,  
Attorneys for Plaintiffs

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

COUNTER-DESIGNATION OF RECORD  
ON APPEAL

The defendant United States of America does herewith counter-designate the record on appeal in the above matter as follows:

All papers, pleadings, motions, orders and notices on file with the Clerk of the United States District Court in said matter, together with the Clerk's Docket Sheet showing all entries made during the pendency of this proceeding.

Dated: June 13, 1958.

LLOYD H. BURKE,  
United States Attorney  
/s/ FREDERICK J. WOELFLEN,  
Assistant U. S. Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 13, 1958.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as

designated by counsel for the Appellants and the Appellee:

Excerpt from Docket Entries.

Complaint.

Petition for and Order Appointing Guardian Ad Litem.

Motion of Defendant for More Definite Statement.

Order Granting Motion for More Definite Statement.

Amended Complaint for Wrongful Death.

Notice by Defendant for More Definite Statement.

Order for More Definite Statement.

Second Amended Complaint.

Answer of Defendant to Second Amended Complaint.

Interrogatories by Defendant to Ora Mae Birdsong.

Order Dismissing case for Lack of Prosecution.

Notice and Motion by Plaintiffs to Set Aside Dismissal.

Affidavit of Jeremiah F. O'Neill, Jr. in Support of Motion to Set Aside Dismissal.

Notice of Appeal.

Appeal Bond.

Statement of Points Upon Which Appellants Intend to Rely on Appeal.

Answer of Plaintiff Ora Mae Birdsong to Interrogatories by Defendant.

Counter-designation of Appellee of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 18th day of July, 1958.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By MARGARET P. BLAIR,

Deputy Clerk

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[Title of District Court and Cause.]

PROCEEDINGS FOR DISMISSAL FOR LACK  
OF PROSECUTION

April 23, 1958

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiff: Messrs. Kaiser & O'Neill, by Jeremiah F. O'Neill, Jr. For the Defendant: Hon. Lloyd H. Burke, U. S. Attorney, by Frederick J. Woelflen, Esq., Assistant U. S. Attorney.

The Clerk: Birdsong, et al., versus the United States.

Mr. O'Neill: Jeremiah O'Neill for the plaintiff.

Mr. Woelflen: Frederick Woelflen for the defendant, the United States.

Mr. O'Neill: If Your Honor please, in this matter on December 17, of '57, I wrote to Mr. Woelflen to see if we could arrange by stipulation the taking of certain depositions of doctors involved in this matter, as well as the hospital records of the Oakland Veterans Hospital.

At that time, he returned our call, to me, telling me that he would attempt to find the doctor. This matter occurred back in 1954; that he would attempt to locate this doctor.

The Court: Is this another mal-practice case?

Mr. O'Neill: It is a wrongful death case, Your Honor.

Mr. Woelflen: I might call Your Honor's attention to the facts. The incident which is the basis of this suit, occurred on April 11, 1954. The suit was filed on April 10, 1956, one day short of the running of the Statute of Limitations.

On June 12, 1956, we filed a motion for a more definite statement, which Judge Murphy granted on July 23, 1956.

The first amended complaint in this action was not trialed until October 8, 1956, approximately two and a half months later.

On November 19, 1956, we filed a motion for a more definite statement on the second amended complaint. Judge Hamlin granted that motion on December 4, 1956.

The second amended complaint was not filed until April 17, 1957, a year after the original complaint was filed, three years after the alleged mal-practice.

We have thereafter, on May 7th, filed interrogatories which were required to be answered in 15 days, and they were not filed until August 29, 1957.

Now, it is true counsel asked me something about doctors in December of 1957, and at that time I advised him that several of our doctors were not available; and in checking the record this morning,



I find that other doctors are no longer in the service of the Government.

I think that this case—I realize counsel's position, but I think that this case is one that is ripe for dismissal, in view of the fact that the incidents which are the basis of this complaint, occurred over four years ago.

Mr. O'Neill: I state, Your Honor, that this is a matter that did not come into my office until just shortly before the case was filed. The case was filed immediately upon receipt in my office.

It involves the death of a young father, and there are two minor children involved.

I have realized the position we are in as far as the doctors are concerned. We have attempted everything in our power to find out where these doctors are, and I just heard this morning from Mr. Woelflen that he now doesn't know where these doctors are.

I was under the impression when I talked to him on the phone that he would attempt to make them available.

If Your Honor would allow me to file a memo under these circumstances, especially involving minors, I will proceed to trial.

The Court: But apparently you don't even know whether you have got a case.

Mr. O'Neill: We will go to trial, Your Honor, on the hospital records, together with the witnesses I intend to call.

The Court: Well, I think this case is just too old.

Mr. O'Neill: Your Honor, it has not appeared



on any calendar prior to this; and if the doctors are unavailable for us, I am willing to go to trial on the hospital records, together with the witnesses I have.

The Court: What witnesses have you got?

Mr. O'Neill: I expect to call a medical witness, Your Honor, a medical expert witness on this matter.

The Court: How can a medical expert witness testify to something when there aren't going to be witnesses to testify for the Government?

Mr. O'Neill: On the hospital records, and on the operative reports, Your Honor.

The Court: How could a judge pass on anything like that? How could anyone give credence to any expert testimony of a man who was going to testify on some writings that somebody put on a piece of paper four years ago?

Mr. O'Neill: These are writings that would be put there, Your Honor, by the doctors who performed the work.

The Court: Obviously you weren't able to plead your cause, because you had to file two amended complaints to show the alleged mal-practice. This case is too old. I will grant the motion to dismiss.

[Endorsed]: Filed August 14, 1958.

[Title of District Court and Cause.]

PROCEEDINGS ON MOTION TO SET ASIDE  
DISMISSAL FOR LACK OF PROSECUTION

June 11, 1958

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiff: Jeremiah F. O'Neill, Jr. For the Defendant: Frederick J. Woelflen, Esq., Assistant U. S. Attorney.

The Clerk: Birdsong, versus United States, motion to vacate dismissal. Counsel state their appearances for the record.

Mr. O'Neill: Jeremiah O'Neill, Your Honor, for the plaintiffs.

Mr. Woelflen: Frederick J. Woelflen, for the United States.

Mr. O'Neill: May I proceed, Your Honor?

The Court: Yes.

Mr. O'Neill: Thank you. If Your Honor please, this matter came up on the last dismissal calendar. It was the first time it had appeared on the dismissal calendar, and Your Honor made an order that the matter be dismissed.

I am appearing here today on a motion to vacate that order, Your Honor, on the basis that any delay that was taken in this particular matter was not intentional, and was not due to—was because of inadvertence on my part.

If Your Honor please, I had arranged back in December of last year, with Mr. Woelflen, for the

taking of depositions of the custodian of records of the Veterans Hospital in Oakland, as well as certain doctors that were involved in this matter.

This is not a case, Your Honor, of mal-practice on the physician himself, but rather, a case involving the conditions at the hospital. So that there is no problem about any particular act of any particular doctor involved.

However, Mr. Woelflen advised me at that time that he would attempt to locate the doctors, but that it may be some period of time before he could, and that he would be glad to proceed by stipulation with the deposition of the custodian of records, and also of the hospital.

I don't mean in any way to infer, Your Honor, that Mr. Woelflen misled me in any way. He was most courteous and most gracious throughout our dealings, all through this case. But because of that, his indication that there would be considerable delay in finding the doctors, I did nothing further until I heard from him, as to when the doctors would be available.

Had it not been for that, Your Honor, I would have proceeded to take the deposition of the custodian of records, and proceeded to have the matter placed on the trial calendar for trial.

I feel that—It's a case where we have a young widow, Your Honor, of about 32 years of age, with two small boys. I feel that the interest of justice would be served in allowing the case to be heard on its merits, and I feel that I could, within 30 days, have the matter completely ready for trial,

Your Honor, and I earnestly move the Court that I be given permission to have the case heard on its merits.

The Court: Well, counsel, this was argued at the time when the matter was on the dismissal calendar, and if I recall, you made very much the same statement you made in this affidavit, now. More in the nature of a motion for re-hearing of the, or on the motion on dismissal.

Mr. O'Neill: Well, I might state, Your Honor, that I didn't have—I didn't state to the Court all the facts that are in the affidavit, or all the reasons therefor. I did mention the letter that I wrote to Mr. Woelflen. That was about the size of it, Your Honor.

I feel that the other matters that I did not at that time present to the Court, that it was through inadvertence on my part and without any intention whatever to delay the matter, Your Honor. I had no intention whatsoever of attempting to put the matter off or keep it from going to trial, or anything of that nature.

The Court: You see, Mr. O'Neill, this is an old case. The matters that were alleged to be after a couple of amended complaints were filed, the cause of action in this case, arose in 1954, four years ago. And the complaint was not filed until the very last day of the statutory period, as I recall.

Mr. O'Neill: That is correct, Your Honor.

The Court: In 1956. Now, two years have again gone by, and it has become an old case. While the statutory period, of course, may be advantaged by

a litigant in filing his suit, at the same time, if the whole period is used, and then another period of equal length of non-prosecution follows, the result is the case really becomes stale, and the Government is not in a position to get witnesses, people have to testify as to old events.

What is your position with respect to this matter?

Mr. Woelflen: Well, Your Honor, I stated my position in the past, and I realize Mr. O'Neill's position; but I have a client that I must represent, and although Mr. O'Neill stated to Your Honor this morning that this deals with conditions at the hospital, that is not necessarily the entire allegation of the complaint, because paragraph 8 of the amended complaint, at page 2, does deal with medical services and treatment of Government doctors.

So it does, in some degree, entail the services and the testimony of Government doctors.

Now, it is to date, 50 months, almost, to the date of the mal-practice, which happened on April 11, 1954, and this is June 11, 1958. So that's four years and two months from the date of this incident. Some of our doctors are no longer available.

I might state to Your Honor, what Mr. O'Neill said was correct, that in December he did call me and I said I would do something about it. During the press of my own business, I overlooked that. But still there was a lapse of four months from the time we discussed this matter until the dismissal calendar, and I think the onus sometimes shifts during that period of time.



If I had neglected, I think counsel should have called it to my attention. Nothing even was called to my attention when the notices for dismissal appeared, and those go out sometimes a week before a dismissal calendar is called. I heard nothing from Mr. O'Neill until he appeared here in Court. If there was some basis in fact for setting aside dismissal, and the facts are readily available to Mr. O'Neill subsequent to April 23rd, I feel in honesty and justice something should have been done immediately, but nothing was done again for another month.

We received this motion on the 28th of May, which was a month after the dismissal. I feel that I cannot, in good conscience, state that the Government could adequately defend this case under the circumstances.

The record will show that there were several amended complaints, several motions for a more definite statement. There was some change in theory or specifications in the charges. Up until the second amended complaint was filed on April 17, 1957, which was a year after the original complaint was filed, and three years after the incident, we were unable to specifically investigate the facts.

We have a hospital file—but to pinpoint exactly what treatment, or what operative procedures were the basis for plaintiff's complaint, we were unable to correlate that until we had the amended complaint filed.

Now, I am not critical of counsel, and I don't want to appear that way, because I know Mr.

O'Neill, and we are personal friends. But I have to take a stand on this. There was many months' lag between the time of the order for the amended complaint, and the filing of the amended complaint. I think the record discloses that. It took practically 11 months to get a responsive complaint on file. And I think Judge Hamlin granted a motion for a more definite statement—I beg your pardon; on June 23, 1956, Judge Murphy granted a motion for a more definite statement.

A first amended complaint was not filed until October 8, 1956, which is approximately two months later. On November 19, 1956, we filed another motion for a more definite statement, which was granted by Judge Hamlin on December 4, 1956.

On April 17, if it please the Court, almost five months later, the second amended complaint was filed.

Now, taking into consideration any dereliction on my part, which would begin on December of 1957, through April of this year, I still feel that there has been some inaction during this period of time, and I don't want to call Your Honor's attention to it, but I think Your Honor is completely aware and fully cognizant of the language of the Court of Appeals in *Bowling versus United States*, which was an affirmant of Your Honor's order for dismissal, which was granted in 1956.

It cited 231 Fed. Sec. 926, which the Court of Appeals said—The language was that the power of a trial court to discuss a case, caused where the matter has become stale by virtue of inaction by



the plaintiff, is inherent and is crystalized by the rules.

And I think Your Honor has followed that policy.

I don't like to embarrass counsel, but I find myself now in an embarrassing position. If counsel was allowed to reinstate this case, and bring it to trial within 60 or 90 days, I would have to represent to the Court we would not be in a position to bring the case to trial.

I have sat on this matter pending information from counsel. And again, we have another action—the record shows that our interrogatories were propounded on May 17, 1957, and under the rules, they are supposed to be answered within 15 days. I usually give concessions on that, but in this case, the interrogatories were not answered until August 29, 1956, which again is beyond the prescribed period.

And that information, when it came in then, we would have been in a position to go fully ahead with the matter. So Your Honor can see that when we were in a position to really go forward, it was a year and four months after the action was instituted, and approximately three years and four months after the cause of action accrued.

And I must respectfully request the Court, in deference to counsel, understanding his position, that the request for the order of dismissal of April the 23rd, stands.

Mr. O'Neill: May I just state, Your Honor, that I would like to correct Mr. Woelflen in one respect,

that when I did receive the notice in this matter, notice that this matter was on the dismissal calendar, I at that time contacted him and, for the first time, was advised the doctors were not available for deposition at that time.

I might state, Your Honor, that even had I noticed the depositions at the time of the custodian of records, at the time that I had written to Mr. Woelflen, the matter would never even have been on the calendar, because the matter would then have had action proceeding toward trial in the matter, and it was simply an inadvertence on our part that we did not take the deposition, because we were waiting to hear when the depositions could be taken.

Now, had we just noticed the deposition, the matter would never even have been on the calendar, Your Honor, and we would have been able to proceed ahead to trial.

Now, I certainly would grant any request that the Government would have in the way of preparation of this case for any purpose at all. But I do feel that the matter should have the opportunity to be heard on its merits; whether it is a meritorious case or not is, of course, one that's going to be up to the decision of the trial judge.

But I do feel that it's a case that should be heard on its merits, Your Honor.

The Court: Submitted?

Mr. Woelflen: I will stand on my prior statements.

The Court: Well, I am satisfied that the record in this case shows a substantial failure to prosecute,

bringing it in the rule for dismissal, and that there has been no showing why the order made on April 23rd for dismissal should be set aside. So the motion to set aside the order of dismissal will be denied.

[Endorsed]: Filed August 14, 1958.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplemental record on appeal herein, as designated by counsel for the appellant:

Reporter's Transcript of Proceedings, April 23, 1958.

Reporter's Transcript of Proceedings, June 11, 1958.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of August, 1958.

[Seal]

C. W. CALBREATH,  
Clerk

/s/ By MARGARET P. BLAIR,  
Deputy

[Endorsed]: No. 16110. United States Court of Appeals for the Ninth Circuit. Jerry Lee Birdsong and Dennis Birdsong, by and through their guardian ad litem, Ora Mae Birdsong, and Ora Mae Birdsong, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 18, 1958.

Docketed: July 24, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 16110

JERRY LEE BIRDSONG and DENNIS BIRD-  
SONG, by and through their guardian ad litem,  
ORA MAE BIRDSONG, and ORA MAE  
BIRDSONG, Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD

Plaintiffs and appellants hereby adopt the state-

ment of points and designation of record appearing in the typed record herein.

Dated: July 22, 1958.

KAISER & O'NEILL,  
/s/ By JEREMIAH F. O'NEILL, JR.,  
Attorneys for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 24, 1958. Paul P. O'Brien,  
Clerk.

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[Title of Court of Appeals and Cause.]

#### APPELLEE'S DESIGNATION OF RECORD

The appellee United States of America does hereby designate the entire record of the United States District Court for the Northern District of California as a record on appeal in the above matter.

Dated: July 29, 1958.

LLOYD H. BURKE,  
United States Attorney  
/s/ FREDERICK J. WOELFLEN,  
Assistant U. S. Attorney  
Attorneys for Appellee

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 30, 1958. Paul P. O'Brien,  
Clerk.

